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State of Utah v. Gerald Doug Fridleifson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
GERALD DOUG FRIDLEIFSON,	:	Case No. 20010392-CA
	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for illegal possession of a controlled substance, a third degree felony offense in violation of Utah Code Ann. § 58-37-8(2)(a) (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

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Defendant/Appellant.	:	Priority No. 2

Appellant Gerald Fridleifson is challenging the trial court's ruling on appeal that officers had reasonable suspicion to detain him. Fridleifson maintains that the total circumstances here permitted officers only to engage in a "level-one" consensual encounter. See State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (identifying different levels of police-citizen encounters, where a level-one encounter is consensual, and a level-two encounter requires reasonable suspicion to support a detention); Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah Ct. App. 1996). When officers asked to speak with Fridleifson and he refused, the officers were not allowed to grab him and push him against his truck. (See Brief of Appellant.)

In response to Fridleifson's argument on appeal, the state seems to narrow the issue before the Court as follows: According to the state, "the parties agreed that the level I encounter escalated to a level II encounter ***when Officer Larson physically seized defendant by pushing him against the truck*** (R. 197:73-74)." (State's Brief of Appellee ("State's Brief"), 14 (emphasis added); see also id., 7 n.5 ("Below, the parties agreed that

the ***physical seizure*** of defendant elevated the level I encounter to a level II encounter requiring reasonable suspicion (R. 197:73-74, 78)").) Indeed, the question in this case hinges on what (if anything) transpired after the officers said, "Can we talk to you", to justify a physical seizure. (See State's Brief, 14.)

With that, this Reply Brief will address the following matters raised by the state's brief on appeal: First, the state claims this Court should look beyond the evidence presented at the motion to suppress hearing to uphold that motion. That is inappropriate. In the context of this case, this Court should consider only the evidence presented to the trial court on the motion to suppress. (See infra, subpoint A., herein.)

Second, the state claims the merits of Fridleifson's argument on appeal may be "summarily reject[ed]" (State's Brief, 11) where Fridleifson failed to properly marshal the evidence in his challenge to the trial court's findings. That claim is incorrect. Fridleifson specifically marshaled the evidence as it related to the findings, and he demonstrated that the findings were insupportable. (See Brief of Appellant, 10-17.) Thus, this Court may disregard the state's marshaling argument on appeal. (See infra, subpoint B, herein.)

Third, with respect to the law applicable to a determination of reasonable-suspicion, this Court consistently has applied a totality-of-the-circumstances analysis. In addition, in determining reasonable suspicion, this Court consistently has given deference to officers and their experience in the field. Case law from this Court concerning the reasonable-suspicion analysis is in harmony with United States Supreme Court precedent.

On that basis, Utah case law and Supreme Court precedent support that the officers here failed to articulate objective facts to support reasonable suspicion. The trial court's ruling on the motion to suppress must be reversed. (See infra subpoint C., herein.)

ARGUMENT

A. THIS COURT SHOULD LOOK ONLY TO THE TRANSCRIPT OF THE MOTION TO SUPPRESS HEARING, WHICH WAS AVAILABLE TO THE TRIAL COURT WHEN IT ENTERED THE FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO THAT MOTION.

According to the state, this Court may look beyond the transcript for the motion to suppress hearing to determine whether the trial court made a correct ruling on that motion. (State's Brief, 3 n.1.) That is inappropriate in this case for the following reasons.

First, in support of its claim, the state cites to Utah case law, which provides that an appellate court may affirm a case on an alternative ground raised for the first time on appeal if that ground is "apparent on the record." (Id. (citing *i.e.* Dipoma v. McPhie, 2001 UT 61, ¶18, 29 P.3d 1225; State v. Bredehoft, 966 P.2d 285, 292 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999); State v. South, 924 P.2d 354, 355-57 (Utah 1996) (recognizing that state may raise alternative ground for affirmance)).) The doctrine of affirming on an alternative ground is not in issue here. (See State's Brief.) Thus, this Court may confine its review of the matter to the record that was available to the trial court when it ruled on the motion to suppress.

Second, Larson's testimony at trial is similar to the testimony he provided at the

motion to suppress hearing. Thus, this Court does not need to consider the trial transcript to determine if the trial court correctly decided the motion; it may focus simply on the transcript for the motion to suppress hearing as the trial judge did in this case.

Third, since the trial judge made his findings on the evidence presented at the motion to suppress hearing, this Court should focus on the same. If this Court were to look beyond the evidence presented at the motion to suppress hearing -- *e.g.* to facts presented at trial -- this Court necessarily would have to make credibility assessments concerning those facts since the trial judge did not consider them in ruling on the motion to suppress. That would be improper. See State v. Green, 78 Utah 580, 6 P.2d 177, 181 (1931) (under Utah law the jury is provided with the sole ability to make credibility assessments at trial); State v. Diaz, 76 Utah 463, 290 P. 727, 731 (1930). Indeed, where the record fails to support affirmance on an alternative ground, and where Larson's testimony at trial is similar to the testimony at the motion to suppress hearing, this Court may avoid making credibility decisions by confining its analysis here to the motion to suppress proceedings.

In short, the facts presented to the preliminary hearing judge[1] and the facts

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1 The state claims that the preliminary hearing was conducted in front of the same judge who conducted the motion to suppress hearing, that is the Honorable Timothy Hanson. (State's Brief, 3 n.1.) In support of that claim, the state cites to the preliminary hearing transcript that was prepared by Salt Lake Legal Defenders Association ("LDA"). (Id.) That transcript is somewhat confusing. It fails to identify that the preliminary hearing was before the Honorable William Barrett. (See R.13-14.) Since LDA prepared the preliminary hearing transcript for Judge Hanson's use, LDA placed his name on the

presented to the jury are irrelevant to the legal analysis where affirming on an alternative ground is not in issue. The trial judge here was not apprised of those facts when he ruled on the motion to suppress. (See R. in general.) In addition, where the motion to suppress was not revisited at trial, the court had no reason to consider the trial facts in that context. To ask this Court to assess trial facts in connection with the legal analysis here is to ask this Court to make credibility determinations on a cold record. That is inappropriate. Here, the trial judge was apprised of the facts as set forth in the motion to suppress transcript. Those should be the facts considered by this Court on appeal.

B. THE STATE CLAIMS THIS COURT SHOULD "SUMMARILY REJECT" FRIDLEIFSON'S APPEAL FOR MARSHALING DEFICIENCIES. THE COURT SHOULD DISREGARD THAT CLAIM. FRIDLEIFSON HAS MET THE MARSHALING REQUIREMENT AND HE HAS DEMONSTRATED THAT THE TRIAL COURT'S FINDINGS ARE INSUPPORTABLE.

The state in part admits that Fridleifson met the marshaling requirement here. (See State's Brief, 11-12 ("Defendant is correct that finding #2 misstates the record evidence").) The state nevertheless urges this Court to "summarily reject the merits" of the appeal on the basis that Fridleifson failed to properly marshal the evidence in favor of certain findings challenged on appeal. (State's Brief, 11.) That argument should be disregarded. Fridleifson has met the marshaling requirement, particularly where the

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transcript. (R. 199.)

During the motion to suppress proceedings, Judge Hanson specifically declined to review the preliminary hearing transcript. (R. 197:1-2.) He looked to the facts presented at the motion to suppress hearing to make his ruling. (See id.)

pivotal factual issues here are concerned. (Brief of Appellant, 10-17.)

By way of explanation, as stated above, the pivotal issue in this case is what transpired after officers asked to speak with Fridleifson as he walked to his truck from the apartment. See supra, pages 1-2, herein. According to the record, the officers asked Fridleifson a permissive question: "Hi. Can we talk to you?" (State's Brief, 6 (acknowledging officers asked permissive question); Brief of Appellant, 12 n.4; R. 197:51-52.)

Since the question was permissive, a reasonable person would feel free to decline the request and to continue on his way, supporting a consensual encounter under the law. See State v. Bean, 869 P.2d 984, 985 (Utah Ct. App. 1994) (the level of a police-citizen encounter is a question of law); see also State v. Barnes, 978 P.2d 1131, 1135 (Wash. App. 1999) (an encounter is consensual under the law if a reasonable person would feel free to walk away; court will assess whether officer used permissive language, *i.e.,* "Can I talk to you guys for a minute?", supports consensual encounter); (State's Brief, 14 and 7 n.5 (acknowledging consensual nature of encounter prior to the "physical seizure"); 197:73 (state acknowledges that police may approach someone and ask a question at any time, which supports a level-one encounter)).

Thereafter, when Fridleifson did not respond, Larson interfered with Fridleifson's ability to continue on his way; Larson physically seized Fridleifson. Before an officer may interfere with a person's ability to proceed on his way, the officer must articulate

reasonable suspicion to justify the interference. In this case, the trial court found that the defendant "continued towards his truck at a rapid pace." (R. 66, ¶7.) The trial court entered that finding at ¶7 to support an "attempt[] to flee" from the officers. (See R. 53 (finding flight); see also State's Brief, 22 (state argues that while a person is free to ignore an officer's request to speak, a person may not engage in flight: "But if in ignoring the request, the suspect also attempts to flee, that response may be considered in determining reasonable suspicion").)

Yet, the marshaled evidence in this case does not support the "rapid pace" or flight. State v. Arroyo, 796 P.2d 684, 687 (Utah 1990) (ruling that findings not supported by substantial competent evidence of record must be rejected). Fridleifson has challenged those findings on appeal, and in doing so, he has met the marshaling requirement. (See Brief of Appellant, 12, 14-15.)[2]

According to the evidence, after officers asked to speak with Fridleifson,

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2 In Fridleifson's opening brief, he specifically challenged the following findings together: the trial court's formal finding at ¶ 7,where the court found that Fridleifson continued to the truck "at a rapid pace" (R. 66; Brief of Appellant, 12); and the trial court's finding in the Memorandum Decision that Fridleifson "left the drug house [that evening] in a hurried manner and, when police officers called out to him, [he] exhibited nervous behavior and apparently attempted to flee to his truck." (R. 53; Brief of Appellant, 14-15.) Those findings are similar; they relate to that point in time when the officers interfered with Fridleifson's ability to continue on his way. (See Brief of Appellant, 12 and 14-15.) Fridleifson specifically marshaled the evidence as it related to the formal finding at ¶ 7 and to the Memorandum Decision. (Brief of Appellant, 12 and 14-15.) Thus, this Court should find that he has satisfied the marshaling requirement.

Fridleifson simply continued to walk toward his truck. His demeanor did not change in any relevant respect to give rise to reasonable suspicion. His pace did not increase; it was not "rapid" or unusual. Also, Fridleifson did not attempt to flee. He continued about his business. Larson testified as follows:

> [PROSECUTOR]: And did you see the defendant do anything when he heard [Officer Washington ask to speak to him]?
>
> [OFFICER LARSON]: ***No.***
>
> [PROSECUTOR]: Did he turn and look at all?
>
> [OFFICER LARSON]: Huh-hu (negative), ***no,*** he continued to walk behind the truck, hooked a right and went up to his door.
>
> [PROSECUTOR]: Did he appear to be startled?
>
> [OFFICER LARSON]: ***No.***
>
> [PROSECUTOR]: Did he jump?
>
> [OFFICER LARSON]: ***No.***
>
> [PROSECUTOR]: Did he – I believe previously you said that he, did he increase his pace as he, as he walked to the truck; is that correct?[3]
>
> [OFFICER LARSON]: I don't recall that he ran or anything like that, ***no.***
>
> [PROSECUTOR]: Okay, so did he just continue to maintain the same pace?
>
> [OFFICER LARSON]: He ***might have gone a little bit faster, but no, he wasn't running.***

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3 The prosecutor was incorrect. Larson did not testify previously to that effect. (R. 197.)

[PROSECUTOR]: Okay, and you continued to walk towards him and he continued to round the truck; is that correct?

[OFFICER LARSON]: Yes.

[PROSECUTOR]: ***And what caused you to grab the defendant?***

[OFFICER LARSON]: ***The fact that he didn't stop***.

(R. 197:53-54 (emphases added); see also 197:43-44 (Larson testified that because the defendant did not stop, he grabbed him); 197:8 (after officers asked to speak with Fridleifson, "[h]e continued to the door of his vehicle").)

The trial court apparently relied on Larson's equivocal statement that Fridleifson "might have gone a little bit faster" to find that he continued to his truck at a "rapid pace" (R. 66, ¶7) and was "flee[ing]" from the officers. (R. 53.) That is insufficient. The record lacks "substantial" or "competent" evidence to support the finding. See Arroyo, 796 P.2d at 687 ("[a] finding not supported by substantial, competent evidence must be rejected"). The trial court findings must be rejected. (See Brief of Appellant, 12, 14-15.)

The state disagrees and points to additional "evidence" that it claims supports the "rapid pace." (State's Brief, 12-13 (discussing finding "# 7").) According to the state, when officers asked to speak to Fridleifson, they were "face-to-face and only a few feet apart," yet far enough away that officers "were forced to approach at a 'faster pace' to keep up with defendant." (State's Brief, 12.) Also, Fridleifson was in a position to see officers but did not acknowledge them. (State's Brief, 12.) Those facts do not support that

Fridleifson continued to his truck at a "rapid pace." Rather, they support that Fridleifson ignored the officers.[4]

According to the state, "a suspect is free to ignore a level I request to speak with an officer." (State's Brief, 22.) Thus, Fridleifson was justified in ignoring the officers as he continued to his truck. He was not required to look at them, acknowledge them or respond to them, particularly where they did not command him to stop or identify themselves as police to him.[5] See Illinois v. Wardlow, 528 U.S. 119, 121-22, 124-25 (2000)

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4 The state cites to the record at 197:8, 33-39 and 41, in further support of a "rapid pace" at ¶7. (State's Brief, 12.) Those citations reflect the following: According to Larson, when officers asked to speak to Fridleifson, he "continued to the door of his vehicle" (R. 197:8). Fridleifson would have been in a position to see officers, but did not look at them. (R. 197:33-34.) Fridleifson "turn[ed] obliquely" to the car door. (R. 197:34.)

After Larson testified to that effect, the trial judge asked him to further clarify the matter. (R. 197:38.) Larson then testified that after Fridleifson left the house, he started to walk toward the truck. At that point, the officers were coming out of the bushes in the dark. (R. 197: 37-39.) The officers were facing Fridleifson and began to walk toward him. "[W]hen the defendant was behind the truck," (R. 197:40), Officer Washington asked to speak with him. (R. 197:37-40.) Fridleifson ignored the officers, "took a right hand turn and walked up the side of his truck." (R. 197:41.) "He did not look back at Officer Washington once he had started toward the door of his car." (Id.) The officers grabbed Fridleifson because he did not stop. (R. 197:44.) Fridleifson was facing the truck at that point. (R. 197:33-39.)

The citations provided by the state do not support "rapid pace."

5 The state claims the officers were "dressed in bright yellow jackets marked with 'police' in two-inch black letters." (State's Brief, 6.) That misstates the evidence. In response to Judge Hanson's questions about their clothing, Larson testified that the jackets were not reflective, but had reflective stripes. (R. 197:57.) Also, he ultimately admitted that he could not recall whether his jacket had a logo on the front or whether it identified him as police. (R. 197:58 (the jacket "may not say police.")) Further, the officers were 20 feet from Fridleifson emerging from a dark alley when they asked to speak with him.

(finding reasonable suspicion, where defendant *fled* after seeing officers in a patrol car in an area known for heavy drug trafficking). Under the total circumstances, continuing about one's business does not support "flight." Id. at 125 (recognizing that "going about one's business" and "flight" are not the same; "flight" supports reasonable suspicion and is the opposite of "going about one's business").

Thus, in the end, the trial court's findings and the marshaled facts reflect the following: Officers observed Fridleifson earlier in the day near the known drug house, while they were involved in arresting a third party. (R. 65.) Officer Larson told Fridleifson that "now" would be a good time to leave if he was there to buy drugs. (R. 66; R. 197:7-8.) Fridleifson thanked the officers and left. (R. 66.) Under the law, he was not required to explain himself. See Brown v. Texas, 443 U.S. 47 (1979).

Fridleifson returned hours later. (R. 66; 197:25-26.) Officers observed him walk down the stairwell and back in "less than five minutes." (R. 66; 197:8.) The officers approached Fridleifson, and Officer Washington said, "Hi. Can we talk to you?" (State's Brief, 6.) Fridleifson did not respond; he continued about his business. (R. 197:33.) Thereafter, the officers did not identify themselves, but rather, they "approached at a faster pace." (R. 197:8, 32); see State v. Beavers, 859 P.2d 9, 18 (Utah Ct. App. 1993) (recognizing that police may not create the urgency of the situation in an effort to justify their warrantless conduct); State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994) (reasonable suspicion standard considers objective facts facing the officer). The officers then grabbed

Fridleifson and pushed him against his truck. (R. 197:8, 34-35; 66.)

The evidence was insufficient to support reasonable suspicion for a seizure. Brown, 443 U.S. 47; State v. Carpena, 714 P.2d 674, 675 (Utah 1986) (a slow moving car with out-of-state plates in a neighborhood where a number of burglaries occurred, without more, may not support reasonable suspicion); Wardlow, 528 U.S. at 124 (officers did not rely only on the fact that defendant was in an area of heavy narcotics trafficking).

The trial court's findings in relevant part are insupportable and cannot sustain the ruling on the motion to suppress.[6]

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6 The state asserts that "when the police observed defendant ascend the basement stairs, they had a reasonable suspicion to seize and temporarily detain him for questioning." (State's Brief, 21.) That assertion is contrary to the state's admission that the level-one encounter escalated "***when Officer Larson physically seized defendant by pushing him against the truck***." (State's Brief, 14.) Also, the fact that Fridleifson ascended the stairs is insufficient to support reasonable suspicion under the totality of the circumstances here. Officers did not observe Fridleifson make contact with anyone at the apartment (R. 197:20), and they did not have any basis to reasonably believe that if he did make such contact, it was related to crime. See Wardlow, 528 U.S. at 124 (finding reasonable suspicion where defendant was observed *in high crime area*, and *he fled* after noticing the police).

The state claims that while the officers admitted they did not observe Fridleifson make contact with anyone at the apartment, they suspected as much. According to the state, "[i]t is disingenuous for defendant to claim" the officers' assumptions were unreasonable, since Fridleifson acknowledged in court that he spoke with someone at the apartment. (State's Brief, 19 n. 11.) That argument is misplaced.

Under the reasonable-suspicion analysis, this Court will assess the objective facts available to the officers at the time of the seizure. See Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (it is imperative that facts be judged against an objective standard: "would the facts available to the officer at the moment of the seizure" justify the conduct?); U.S. v. Place, 462 U.S. 696, 706 (1983) (officer's observations at the time of the seizure must lead him to believe that criminal activity is afoot). It is irrelevant in this case that officers

C. THIS COURT'S FOURTH AMENDMENT ANALYSIS IS CONSISTENT WITH UNITED STATES SUPREME COURT PRECEDENT. UNDER THE PROPER ANALYSIS, THE OFFICERS HERE ENGAGED IN AN UNLAWFUL DETENTION.

The reasonable-suspicion analysis requires the police officer to point to "specific and articulable facts" about the suspect and total circumstances, which taken together with rational inferences from those facts, reasonably warrant a level-two detention. See Terry v. Ohio, 392 U.S. 1, 21 (1968). "The test for when the seizure occurred is objective," and considers the totality of the circumstances. State v. Ramirez, 817 P.2d 774, 785-86 (Utah 1991).

Since 1987, this Court has recognized that under the reasonable-suspicion standard, an "officer is entitled to assess the facts in light of his experience" because "a trained law enforcement officer may be able to perceive and articulate meaning in a given conduct which would be wholly innocent to the untrained observer." State v. Trujillo, 739 P.2d 85, 88-89 (Utah Ct. App. 1987) (cite omitted); State v. Menke, 787 P.2d 537, 541 (Utah Ct. App. 1990). That is, if an officer considers it relevant that a person appeared stiff and rigid, a court *may not* disregard those facts in assessing the matter. See i.e., U.S. v. Arvizu, 122 S.Ct. 744, 749, 752 (2002) (finding that the court of appeals

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learned ***four months later*** at the motion to suppress hearing that Fridleifson actually spoke with someone at the apartment. (See R. 197.) In this case, Larson testified that he had no way to know if Fridleifson made contact with anyone at the apartment, or what may have transpired. (R. 197:20, 26.) Those facts alone *faced the officers* at the time of the detention; they are necessarily part of the analysis.

improperly disregarded evidence under the totality of the circumstances). However, if an officer seizes a person based on those facts, the officer must be able "to *articulate* what it is about those facts which leads to an inference of criminal activity." Menke, 787 P.2d at 541. If an officer fails to articulate sufficient objective facts to support the seizure, this Court cannot sustain the officer's conduct.

Importantly, for purposes of this matter, the United States Supreme Court has not ruled that an officer's *subjective belief*, hunches, or assumptions about the situation should be given any deference; they are irrelevant in assessing the total and objective facts for reasonable suspicion. Terry, 392 U.S. at 21-22, 27 (requiring objective facts); Lopez, 873 P.2d at 1136-37 (an officer's state of mind is irrelevant); State v. Patefield, 927 P.2d 655, 659 (Utah Ct. App. 1996); Barnes, 978 P.2d at 1135 (officer's subjective belief is immaterial).

In this case, the state does not rely on Larson's objective observations as they relate to Fridleifson to claim that the officers were justified in detaining him. Rather, the state relies on the illegal activity of unrelated individuals, statements that were never made in the matter, and the actions of the officers. (See State's Brief.)

That is, the state relies on the following "facts" to support the officers' conduct. Earlier on the day in question, the officers arrested an individual who had just visited the house, and they discovered drugs on that person. The state claims as a result of that arrest, "the police positively knew" that "the occupants of the suspect-apartment were trafficking

drugs." (State's Brief, 16.) Significantly, Larson did not testify to that fact. (R. 197:7 (officers arrested person that they "believed had bought drugs inside the house").)

Next, the state asserts that Fridleifson "knew that the apartment he was frequenting was currently and actively trafficking drugs and had been warned to stay away." (State's Brief, 16-17.) According to the record, prior to the seizure at issue here, Fridleifson visited the apartment on one prior occasion. There is no evidence that he was a frequent visitor. (See R. 197:24.) During the earlier visit, officers were in the process of arresting a person. Officer Larson said to Fridleifson that if he was there to buy drugs, "now" would be a good time to leave. (R. 197:7-8, 24-25.) Larson testified that when he made that statement to Fridleifson, he was involved in arresting the earlier suspect. (R. 197:25.) The officers did not say anything more. Thus, Fridleifson had no reason to explain himself to police. He simply thanked them and left. (R. 197:7-8); see Brown, 443 U.S. at 48-49, 52-53 (defendant's unexplained presence in high crime area insufficient to support reasonable suspicion).

Hours later, Fridleifson returned to the apartment.[7] (R. 197:7-8.) That was

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7 The state makes much of the fact that Fridleifson "did not park directly behind the apartment" even though, according to the state, Fridleifson admitted "*there may have been parking available*" there. (State's Brief, 18-19.) The state's assertion is incorrect. When defense counsel asked Fridleifson whether parking was available behind the subject apartment, Fridleifson testified, "I don't think so." Then he clarified that he did not recall. (R. 197:68.) Fridleifson did not admit "there may have been parking available" as claimed by the state. No other testimony was presented at the hearing with respect to whether parking was available behind the apartment.

reasonable since Fridleifson had been told earlier by the officers that "now" was not a good time to be there. (R. 197:7-8, 25.) When Fridleifson returned, officers observed him descend the stairs to the apartment, but they did not observe whether he made contact with anyone there, or whether he exchanged anything with anyone at the apartment. (R. 197:20, 26); supra, note 6, herein. Fridleifson came back up the stairs "less than five minutes later." (R. 197:8.)

In sum, the officers observed that after Fridleifson had been told that "now" would not be a good time to visit the apartment under surveillance for drug activity, he returned hours later. Those were the total facts available to the officers at the time they approached Fridleifson and asked to speak with him. (See R. 197.)

As set forth in Fridleifson's opening brief (Brief of Appellant, 17-33), this case is similar to State v. Potter, 863 P.2d 40 (Utah Ct. App. 1993) (during *surveillance* of a *trailer home* for *drug activity, officers observed* defendant drive up and *enter home*, then exit after about three minutes; evidence was insufficient to support reasonable suspicion); State v. Sykes, 840 P.2d 825, 827 (Utah Ct. App. 1992) (*during surveillance of drug house*, officer observed *defendant drive up, park, enter house*, then leave approximately three minutes later; although court considered all facts in light of officer's "specialized experience" and training, it ruled the total, objective circumstances failed to support reasonable suspicion); and State v. Steward, 806 P.2d 213, 214-15 (Utah Ct. App. 1991) (defendant's presence in a neighborhood suspected of drug activity together with his

stated intent to visit a house that officers knew had drugs, and his panicky or startled look did not give rise to reasonable suspicion that defendant was involved in criminal activity).

Those cases govern here. See also Carpena, 714 P.2d at 675 (slow moving car with out-of-state plates in high crime area is not sufficient for reasonable suspicion); Brown, 443 U.S. 74 (defendant's unexplained presence in high crime area does not support reasonable suspicion). The state does not ask this Court to overrule that line of cases. See State v. Menzies, 889 P.2d 393, 398 (Utah 1994) (party seeking to overrule precedent has heavy burden), cert. denied, 513 U.S. 1115 (1995).

Instead, the state claims that if officers had observed or overheard a hand-to-hand "drug transfer" between Fridleifson and a person at the apartment, that would establish probable cause to arrest. (State's Brief, 20.) That is irrelevant. Fridleifson does not assert that officers had to observe a "drug transaction" here to support reasonable suspicion. (Brief of Appellant, 24, 29-30.) Rather, the officers simply were required to articulate objective facts to support a reasonable suspicion that criminal conduct was afoot.

In other cases cited by the state, the officers articulated such reasonable suspicion. For example, the state relies on State v. Beach, 2002 UT App 160, 447 Utah Adv. Rep. 17. (State's Brief, 20, 22.) In that case, an officer drove past defendant on the street, and observed the defendant pass something to an individual in a car, while the car was parked partially in a lane of traffic in an area of a known drug house. As the officer turned the police car around, defendant began to walk rapidly in the opposite direction. This Court

ruled those facts supported "reasonable suspicion." Beach, 2002 UT App 160, ¶¶2, 9.

Although the officer in Beach did not observe "a hand-to-hand drug transfer" (State's Brief, 20), he did observe *contact* consistent with a drug buy *between* defendant and another party *in the area of a known drug house.* Beach, 2002 UT App 160, ¶9. Also, defendant made a *rapid retreat* when officers turned around, thereby supporting reasonable suspicion for detention. Beach, 2002 UT App 160, ¶¶2-3, 9, 15. Those facts are not present in Fridleifson's case.

The state also relies on Menke, 787 P.2d 537. (See State's Brief, 20-21.) That case was decided before Steward, Potter, and Sykes.

There, officers observed defendant -- approximately 100 feet from an entrance to Crossroads Mall – remove items from under his shirt, look at the items as though he had never seen them before, then place the items in non-retail merchandise-type sacks. Menke, 787 P.2d at 539, 541. Defendant's actions were indicative of retail theft, and supported officers' reasonable suspicion for a detention. Id.

As set forth in the opening brief (Brief of Appellant, 24), officers here did not observe anything unusual about Fridleifson's behavior. For example, they did not observe him carry anything to or from the apartment, and they did not observe unusual bulges in his clothing to suggest that he was transporting drugs, as set forth in cases cited by the state. (State's Brief, 20-23, citing Menke, 787 P.2d 537; and U.S. v. Buchannon, 878 P.2d 1065 (8th Cir. 1989), where officers observed defendant *enter known drug house*

with diaper bag, then *exit* a short time later and get into car; officers followed defendant and observed *furtive gestures,* supporting traffic stop under total circumstances.)

Also, when the officers asked to speak with Fridleifson, he did not quicken his pace or change his course, as in cases cited by the state. (See R. 197:53-54 (Fridleifson did not do anything when officers spoke to him; indeed, officers stopped Fridleifson because he did not do anything); also State's Brief, 21-23, citing In the Interest of D.M., 781 A.2d 1161, 1162 (Penn. 2001), where officer approached defendant, who matched the description of a man with a gun as reported by dispatch, and defendant "ran away from the officer," supporting reasonable suspicion; State v. Dickerson, 481 N.W.2d 840, 842, 842-43 (Minn. 1992), where the following facts supported the detention: officers observed defendant leaving a "24-hour-a-day crack house," defendant made eye-contact with officers, and defendant engaged in evasive conduct where he abruptly changed his course of direction to avoid officers, aff'd, Minn. v. Dickerson, 508 U.S. 366 (1993).)

Rather, in Fridleifson's case, the *officers* quickened their pace. (R. 197:8.) The officers' actions are irrelevant and may not be used to justify the warrantless conduct. Beavers, 859 P.2d at 18 (ruling that police may not create the urgency of the situation in an effort to justify their warrantless conduct).

Indeed, additional objective facts necessary to support reasonable suspicion do not exist here. (See *e.g.*, State's Brief, 20-23, citing State v. Davis, 821 P.2d 9, 10-12 (Utah Ct. App. 1991), where an officer had reasonable suspicion based on the following

observations: a passenger urinating outside a stopped car, a can of beer on the trunk, and the strong odor of alcohol on the driver's breath; citing U.S. v. Griffin, 909 F.2d 1222 (8th Cir. 1990), where an officer had reasonable suspicion based on the following: (i) FBI and state agencies had information through wire-tape investigation of a planned heroin delivery at third-party residence on December 10, 1988, (ii) during surveillance of residence on that day, first officer observed defendant, who was target of the investigation since spring of 1988, leave the house with a small item in his possession, (iii) first officer relayed information to second officer, who followed defendant's car, (iv) defendant was then seen outside the suspect car, and as second officer tried to initiate a traffic stop, (v) defendant screamed to driver in suspect car and fled; and citing State v. Holmes, 774 P.2d 506 (Utah Ct. App. 1989), where officers were justified in stopping defendant vehicle on suspicion of prostitution based on the following: the officers observed defendant talking to various male occupants of cars along State Street, they observed her "strolling" along the street and looking backwards, officers followed defendant after she got into a car with a male, and they observed a "somewhat evasive" driving pattern where the suspect car drove through two high school parking lots as though they knew they were being followed.)

And finally, the state's reliance on U.S. v. Arvizu, 122 S.Ct. 744 (2002), does not compel a finding of reasonable suspicion here. (State's Brief, 16, 21.) In Arvizu, the Supreme Court recognized that under the totality-of-the-circumstances analysis, an

appellate court must take into consideration observations made by the officer based on his experience and specialized training. Id. at 750. This Court has abided by that standard since 1987. See Trujillo, 739 P.2d at 88-89; see also Sykes, 840 P.2d at 827.

Also, the Arvizu Court found reasonable suspicion based on the following. According to the record, the Arizona town of Douglas is located on the United States-Mexico border. Two highways lead north from Douglas, Highway 191 and Highway 80. An immigration checkpoint is located on Highway 191. Arvizu, 122 S.Ct. at 748.

Drug smugglers were known to use back roads to circumvent the checkpoint. Officers used directionally sensitive sensor signals to alert them to the use of the back roads from the border. Id. at 748. A sensor was used on Leslie Canyon Road, which ran parallel to Highway 191 and was the "only other northbound road from Douglas" besides the two highways. Id. at 748. Leslie Canyon Road was unpaved for a stretch. It was rarely used. Drug and immigrant smugglers used it to connect onto Rucker Canyon Road then Kuykendull Road. Kuykendull Road ultimately allowed smugglers access to Phoenix and Tucson. Id. at 748. The Kuykendull Road in part was primitive and was the last possible turnoff to avoid a border checkpoint. Id.

On an afternoon in January 1998, a border-patrol agent received a message that the Leslie Canyon Road sensor had triggered at a time when agents would have been involved in a shift change, leaving the area unpatrolled. Id.

The agent left to investigate, when he received a report that the Rucker Canyon

Road sensor also had triggered. The agent's timing was such that when he observed a minivan on the road, he believed it to be the vehicle that triggered the sensors. Also, he had not seen any other vehicle on the road. Id. at 749.

The agent pulled off the road to observe the minivan drive by. He saw two adults and three children in the minivan. The driver appeared rigid, and two of the children in the back where sitting as if their knees were propped up on cargo on the floor. Id. As the agent began to follow the minivan, he observed the children put their hands up at the same time and wave in an abnormal pattern, off and on for about four of five minutes. Id. The waving was "'methodical,' 'mechanical,' 'abnormal,' and 'certainly . . . a fact that is odd and would lead a reasonable officer to wonder why they are doing this." Id. at 752.

The agent then observed the driver turn onto Kuykendull Road. That was significant to the agent because it would allow the minivan driver to avoid the checkpoint. Id. at 749. Also, based on the route the minivan was taking, the agent could not conceive of any place for the occupants to picnic, since they were heading away from picnic areas. The agent "radioed for a registration check and learned that the minivan was registered to an address in Douglas that was four blocks north of the border in an area notorious for alien and narcotics smuggling." Id. at 749. At that point, the agent determined to stop the vehicle. Id. During a consensual search, he discovered duffel bags of marijuana under the feet of the children in the back seat. Id. at 749-50.

On appeal, the United States Court of Appeals for the Ninth Circuit refused to

consider some of the agent's observations, and ruled the stop was unconstitutional. Id. at 750, 751. The United States Supreme Court reversed the decision of the Ninth Circuit and reiterated that reviewing courts must apply the totality-of-the-circumstances analysis. Since the Ninth Circuit rejected certain facts, its ruling could not be upheld. Id. at 751, 753; see also U.S. v. Cortez, 449 U.S. 411 (1981) (based on evidence of specific foot prints in the desert over a particular route, officers deduced that an individual was transporting illegal aliens; officers stopped a vehicle that fit criteria for specific operation they had investigated).

In Fridleifson's case, the total circumstances must be considered in the matter. Here, the officers observed Fridleifson in the area of a known drug house. When Officer Larson dissuaded Fridleifson from going to the apartment on the afternoon in question, Fridleifson left. He then returned hours later. When the officers approached Fridleifson from a dark alley and asked to speak with him, Fridleifson ignored the officers and continued about his business.

Officers did not observe any unusual or abnormal behavior on Fridleifson's part, they did not conduct a registration check to determine if Fridleifson's car had any history associated with drugs, and they did not consider Fridleifson to be nervous, stiff or rigid when they asked to speak with him. In addition, the officers did not observe Fridleifson make contact with anyone at the residence and they did not observe him carry anything to or from the apartment to support that crime was afoot.

Based on the objective facts, the officers here were entitled only to approach Fridleifson for a consensual encounter. When Fridleifson did not acknowledge the officers, they were not entitled to grab Fridleifson and force him against the truck. The facts fail to support reasonable suspicion. As further set forth in the opening Brief of Appellant, the trial court's ruling on the motion to suppress must be reversed.

CONCLUSION

For the reasons set forth herein, Fridleifson respectfully requests that this Court reverse the trial court's ruling on the motion to suppress, and remand this case to the trial court for dismissal of the charge or a new trial.

SUBMITTED this 14th day of August, 2002.

LINDA M. JONES
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 14th day of August, 2002.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this __ day of _____, 2002.

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